Supreme Court, U. S.
FILED
APR 10 1974
MICHAEL RODAK, JR., CLERK

No. 73-5677

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

MAURICE SCHICK, Petitioner,

v.

GEORGE J. REED, et al., Respondents.

Pet's Reply ~~SUPPLEMENTAL~~ BRIEF

HOMER E. MOYER, JR.
ROBERT N. SAYLER
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-5677

MAURICE SCHICK, Petitioner,

v.

GEORGE J. REED, et al., Respondents.

SUPPLEMENTAL BRIEF

The Supreme Court of California, sitting en banc, has just ruled that a no-parole condition attached to the commutation of a death sentence to life imprisonment is invalid under case law holding capital punishment to be unconstitutional. This California decision, In re Walker Crim. No. 16711 (Cal., Feb. 14, 1974), involves precisely the same issue as does this case. Its conclusion is directly contrary to the decision in the Court of Appeals below and confirms that this case presents a substantial constitutional issue that will undoubtedly arise in other states.

The facts of Walker and this case are virtually indistinguishable. Both Schick and Walker were charged with first degree murder. Like Schick, Walker entered a plea of not guilty by reason of insanity, and, like Schick, he was found to have been sane at the time of the offense, found guilty, and sentenced to death. In 1961 the governor commuted his death sentence to life imprisonment without

possibility of parole, the same form of clemency as that exercised by President Eisenhower in Schick's case. In 1972, Walker challenged his conviction collaterally, and in 1974, on appeal from a decision of the Solano County Superior Court, the California Supreme Court considered, inter alia, whether Walker's conditionally commuted sentence was affected by People v. Anderson, 6 Cal. 3d 628 (1972), the California decision that retroactively held capital punishment to be unconstitutional.

The court in Walker first observed that the only punishments provided for first degree murder under the California Penal Code were life imprisonment or death, which are the same alternatives provided by the Uniform Code of Military Justice under which Schick was sentenced. While rejecting the argument that the combined effect of Anderson and the governor's commutation was to increase the severity of petitioner's punishment, the court nevertheless held that the no-parole condition attached to the commutation was constitutionally invalid. Since the Anderson decision invalidating the death penalty is "'fully retroactive,'" any first degree murderer subject to a sentence greater than life imprisonment for that offense is entitled to have his sentence modified. To hold otherwise, the court ruled, would discriminate inequitably against those prisoners sentenced to death who had been subject to clemency in the form of commutation to life imprisonment without possibility of parole.

> It manifestly would be inequitable to hold that, although murderers now under sentences of death may have their sentences reduced to life imprisonment (which is with possibility of parole (see penal code Section 3046)) murderers such as petitioner whose death

> sentences have been commuted to life imprisonment without possibility of parole are not entitled to have that restriction removed from their life sentences [emphasis in the original].
>
> Pp. 40-41, slip opinion.[1/]

Comparing prisoners in Walker's situation with prisoners whose death sentences had not been commuted, the court continued:

> The two groups are identical except that prisoners in the latter group have had their sentences commuted, not unlikely as a result of circumstances in mitigation of the offense. And no considerations have led us to conclude that such inequities should be permitted.
>
> Id., at 41.

In addition, at page 40 of its slip opinion the Supreme Court of California expressly rejected the argument that petitioner is entitled to no relief because he is no longer under a sentence of death, the argument upon which the Solicitor General's Memorandum in Opposition places primary reliance. The court also rejected the novel suggestion, implicit in the Solicitor General's Memorandum, that under Furman previously imposed death penalties shall be retroactively void for some purposes (viz., the carrying out of such sentences) but not others (viz., providing the basis for imposing commuted sentences not provided by law).

It should further be noted that the only two cases cited in support of the legality of commuting to a sentence not provided by statute furnish doubtful support for that proposition. In both cases, Ex parte Harlan, 180 Fed. 119 (C.C.N.D. Fla. 1909), and Stroud v. Johnson, 139 F.2d 171 (9th Cir. 1943), the relevant language is dicta. And both decisions cite as their only authority Ex parte Wells, 59 U.S. (1855), which, as the Petition for Certiorari

---

1/ The Solicitor General states in his Memorandum in Opposition that he has filed a copy of the slip opinion with the Clerk.

discusses, did not involve conditional commutation. Moreover, Ex parte Harlan, supra, itself involved not commutation, but mitigation, and even that clemency action had not been officially granted.[2/]

Finally, defendant's argument that commutation to life imprisonment without possibility of parole is not unlawful is not supported by the assertion that "[t]he no-parole condition is clearly one known to law." Memo. in Opp. at 4. The no-parole condition is not, and never has been, provided by statute for first degree murder, either under civilian federal law or the Uniform Code of Military Law. Nor has a no-parole condition ever been sanctioned in conjunction with life imprisonment. Further, those few situations in which no-parole conditions have been sanctioned have involved prior consideration and explicit approval by the legislature.

For these reasons and the reasons stated in the Petition for Certiorari, the Petition should be granted.

Respectfully submitted,

HOMER E. MOYER, Jr.
ROBERT N. SAYLER
888 Sixteenth Street, N. W.
Washington, D. C. 20006

Attorneys for Petitioner

2/ Other early instances of imprecise use of the term "commutation" and the confusion that has resulted are discussed in the Petition in footnotes 7 and 8 and at pp. 15-18.